



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 23, 1998

Ms. Linda Wiegman
Supervising Attorney
Texas Department of Health
1100 West 49th Street
Austin, Texas 78711-3199

OR98-2290

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 118518.

The Texas Department of Health (the "department") received a request for information regarding Devereaux Hospital and Neurobehavioral Institute of Texas, a private psychiatric hospital licensed by the department. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code, in conjunction with various state statutes and federal regulations, excepts portions of the requested documents from disclosure. We have considered the arguments you raise and have reviewed the documents at issue.¹

Initially, we note that the submitted documents include a report about the hospital's compliance with federal law as a Medicare provider. Federal regulations require the department to release the HCFA form 2567, statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to

¹The department failed to timely request an open records decision from this office. Gov't Code § 552.301. In most cases, failure to timely request a decision results in the legal presumption that the requested information is presumed to be open to the public, and only the demonstration of a compelling interest can overcome the presumption. See *Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). However, the presumption of openness may be overcome when the requested information is deemed confidential by law. See Open Records Decision No. 150 (1977).

offer comments. See 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988). It appears that the hospital has had a reasonable opportunity to review and comment on the report. Thus, in accordance with federal law, the department must release the HCFA form 2567.

Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person, and if the information is of no legitimate concern to the public. See *id.* In this case, common-law privacy protects many of the patient's identities from disclosure. We have sample marked documents as a guide. The department must withhold under section 552.101 in conjunction with the common-law right to privacy information that would identify the individual in the instances where the department asserts a privacy interest.

Section 5.08 the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

V.T.C.S. art. 4495b, § 5.08. Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, access to medical records is not governed by chapter 552 of the Government Code, but rather the MPA. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. See V.T.C.S. art. 4495b § 5.08(a), (b), (c), (j); Open Records Decision Nos. 598 (1991), 546 (1990). We have reviewed the marked information in the submitted documents which the department asserts is subject to the MPA and have sample marked documents as a guide. We agree that the department may only release this information in accordance with the MPA.

You contend that some of the records at issue are confidential under chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have reviewed the marked the information that the department asserts is confidential under section 611.002(a) and have sample marked documents as a guide. Accordingly, the department may only release this information as provided by sections 611.004 and 611.0045.

You also claim that some of the submitted records are confidential under section 161.032(a) of the Health and Safety Code. This provision provides that "records and proceedings of a medical committee are confidential and are not subject to court subpoena." The confidentiality does not extend to "records made or maintained in the regular course of business by a hospital." Health & Safety Code § 161.032(c). A "medical committee" includes, among other things, any committee of a hospital. *Id.* § 161.031(a). Documents generated by a committee in order to conduct open and thorough review are confidential, as are documents that have been prepared by or at the direction of the committee for committee purposes. *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986) (orig. proceeding). We have reviewed the marked the documents that are "records and proceedings of a medical committee and have sample marked documents as a guide. Accordingly, these documents are made confidential by section 161.032 of the Health and Safety Code and must be withheld under section 552.101.

Finally, we note that the submitted documents contain information relating to two investigations of alleged sexual abuse. If these investigations were conducted pursuant to chapter 261 of the Family Code or chapter 48 of the Human Resources Code, then documents relating to the investigations must be withheld from disclosure under section 552.101 as information made confidential by law. *See* Fam. Code § 261.201 (information used or developed in investigation of child abuse or neglect is confidential), Hum. Res. Code § 48.101 (information used or developed in investigation of abuse or neglect of elderly or disabled is confidential).

You also raise section 48.101 of the Human Resources Code, which pertains to disclosure of information about reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities. Section 48.101 reads in part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

(1) a report of abuse, neglect, or exploitation made under . . . chapter [48 of the Human Resources Code];

(2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications, and working papers used or developed in an investigation made under this chapter or in providing services as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department rule and applicable federal law.

Some of the submitted documents, which you have marked, are confidential pursuant to section 48.101(a) of the Human Resources Code and we have sample marked documents as a guide. *See* Hum. Res. Code § 48.082(a); *see also id.* § 48.002 (definitions). Consequently, these documents must not be disclosed to the public, except for a purpose consistent with chapter 48 of the Human Resources Code, or as provided by department rule or federal law. *See id.* § 48.101(b); 25 T.A.C. § 1.207; *but see* Hum. Res. Code § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances).

Additionally, we note that section 81.046 of the Health and Safety Code provides in pertinent part:

(a) Reports, records, and information furnished to a health authority or the department that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter.

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under [the Open Records Act] and may not be released or made public on subpoena or otherwise except as provided by Subsections (c) and (d).

In Open Records Decision No. 577 (1990), this office concluded that any information acquired or created by the department during an investigation under chapter 81 is confidential and may not be released unless an exception set out in the statute applies. The information that the department has marked is confidential under section 81.046 as it does

not appear that any of the statute's exceptions apply to the requestor. *See* Health & Safety Code § 81.046(c), (d). Therefore, we conclude that the department must withhold the marked information from disclosure pursuant to section 81.406.

Finally, we note that section 552.101 also excepts information that is confidential under constitutional or common-law privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse or the detailed description of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have reviewed the marked documents submitted for our consideration and have sample marked documents as a guide. Consequently the marked the information, as well as similar information must be withheld under constitutional or common-law privacy.

Additionally, we note that you information which is protected from disclosure by section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

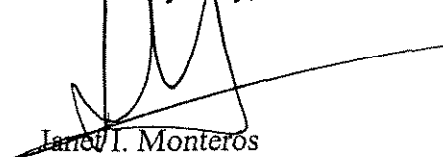
- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Consequently, you must withhold the marked driver's license information under section 552.130.

Also, a social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii). In relevant part, the 1990 amendments to the federal Social Security Act make confidential social security account numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We caution, however, that an employer may be required to obtain an employee's social security number under laws that predate October 1, 1990; a social security number obtained under a law that predates October 1, 1990, is not made confidential by the 1990 amendments to the Social Security Act. Based on the information that you have provided, we are unable to determine whether the social security numbers contained in the submitted documents are confidential under federal law. On the other hand, section 552.352 of the *Government Code* imposes criminal penalties for the release of confidential information. Therefore, prior to releasing *any* social security number, you should ensure that it was not obtained pursuant to a law enacted on or after October 1, 1990. We note, however, that hiring an individual after October 1, 1990, is not the same as obtaining an individual's social security number pursuant to a law enacted on or after October 1, 1990.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at gissue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Janet I. Monteros", written over a horizontal line.

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/nc

Ref.: ID# 118518

Enclosures: Submitted documents

cc: Ms. Leah Faucett
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